SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 141

JOSEPH ROBERT STEVEN BROSSARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

JOSEPH ROBERT STEVEN BROSSARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1970. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to ..... 1970.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Petitioner raises constitutional questions. They involve the Fifth Amendment clause concerning due process.

Involved here is the agency's regulation, as interpreted and applied that a late [after an order to report for induction] crystallization of conscientious objection to military service is not a circumstance beyond his control.

The Fifth Amendment complaint, in brief, is that (1) the administrative agency made an ipse dixit conclusion, one without basis in fact, and (2) that involved here is a conflict between the Act and the agency regulation.

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1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on March 30, 1970. See Appendix C to this petition.

The questions presented here were raised in the trial court by written Motion for Judgment of Acquittal and briefed to the Court of Appeals for the Ninth Circuit.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment, § 456 (j) of the Universal Military Training and Service Act of 1951, and the agency regulation, 32 C.F.R. § 1625.2. They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Brossard with a violation of the Universal Military Training and Service Act of 1951 for refusing to submit to induction.

Brossard pleaded Not Guilty and was tried by the Honorable Albert Lee Stephens, Jr., sitting alone without a jury. He was found guilty and sentenced.

6. THE FACTS

The facts are found in the complete Selective Service System file[2] of the petitioner and the oral testimony in the trial court.

Petitioner registered in July 1964 in Canada. When he came to California he was given his permanent board and was renumbered. The subsequent minutes of actions are found on Ex. 11.

The pertinent facts of his processing are that after his student status expired he was sent an Order to Report for Induction on November 15, 1966, the board having mailed it on October 26, 1966 [Ex. 61].

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2. This file, Government's Exhibit No. 1 is pencil paginated at the bottom of each sheet and is hereinafter referred to by sheet numbers, such as [Ex. 1].

On November 10, 1966, he handed in a written request for the Special Form for Conscientious Objector, SSS Form No. 150 [Ex. 61]

On the same day he handed in the following letter to the board's clerk. "I herewith hand you my special form and request that you reopen my classification to give me a hearing before you determine my sincerity." [Ex. 63]. This sheet shows the following notation: "11/10/66 Postponement of induction or reopening of classification denied." [Ex. 63].

In his Special Form for Conscientious Objectors, petitioner had presented a non-frivolous prima facie case. This Special Form is on sheets 64-68 of the exhibit.

7. REASONS FOR GRANTING WRIT

A national decision is required on constitutional problems, one that has left the lower courts divided.

Involved here is the agency's regulation, as interpreted and applied, that a late [after an order to report for induction] crystallization of conscientious objection to military service is not a circumstance beyond his control.

Two Fifth Amendment problems are presented: One, a conflict between the Act and the agency regulations, and Two, an interpretation of the nature of conscientious objections, an interpretation that has divided the Courts of Appeals during the last past two years, on this question: is a conscientious objection that crystallizes only after the mailing of an Order to Report for Induction, a change of status "beyond the control of the registrant," and therefore within the provided exception to the said agency "dateline" regulation?

The Fifth Amendment questions presented are of an importance greater than one individual's fate. The ques-

tions are national because the reach of the Selective Service System is into every hamlet, the "calls" for induction show every indication of continuing, and the percentage of registrants professing conscientious objections to war is not decreasing, therefore numerically many persons are affected.

The administrative agency's handling of these claims, and their often too summary disposition by the courts is due to insufficient guide lines, one conforming to the demands of the Fifth Amendment.

8. ARGUMENT

Because petitioner was a "late claimant" for conscientious objection status [he filed his claim after the Order to Report for Induction], petitioner was denied the important Fifth Amendment rights of equal protection and due process of law.

The Selective Service System regulations discriminate against "late claimants." Yet the intention of Congress is clear. Conscientious objectors are to be exempt if they meet the standard established by Congress. The Selective Service System regulations in this record are in conflict with the will of Congress as enacted into law and thus are invalid.

Further, the local board gave no rational reason for denying the claim of petitioner. It has been held that when a local board denies a conscientious objector classification in a situation where a prima facie case has been presented there must be a rational basis for such action and the local board must state its reasons for such action. *United States* v. *Haughton,* 413 F.2d 736, 9th Cir. (1969). This was not done in case of petitioner.

The Court of Appeals merely concluded ipse dixit, that Brossard was insincere, and like the trial court and the Selective Service System, gave no supporting facts.

Petitioner Brossard believes that facts are required to support any conclusion. A naked conclusion is not enough; that the Fifth Amendment requires a factual basis.

Many courts are so expressing themselves. A hearing should be granted, on certiorari, to have this point thoroughly argued.

The Selective Service System made an ipse dixit conclusion in denying the claim of petitioner in regards to his claim for a I-O conscientious objection classification. Such action violated petitioner's Fifth Amendment rights.

In *Dickinson* v. *United States,* 74 S.Ct. 152 (1953) at 157, the Supreme Court partially catalogued the many means by which local boards could test the truthfulness of a registrant's claims, and page 158, where it denounced "dismissal of the claim solely on the basis of suspicion and speculation." As Mr. Justice Jackson stated bluntly the holding of the *Dickinson* Court (in his dissent):

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The Board must find and record affirmative evidence that he has misrepresented his case. . . ." (74 S.Ct. 152, 159)
> This was not done in petitioner's case.

As the U. S. Court of Appeals for the Fifth Circuit stated the matter in a case concerning a I-O conscientious objector claim, *William* v. *United States,* 216 F.2d 350 (1954) at 352:

> "If there was no evidence before the board to refute the defendant's professed belief and if that belief was sincere on his part, then under the Act of Congress,

he was exempt from training and service. As stated, we have found no such evidence in the record."

Despite petitioner's prima facie claim, his classification was not reopened. By holding that it did not reopen petitioner's classification, the local board deprived petitioner of important appellate rights. As Chief Judge Fred J. Nichol pointed out in *United States* v. *Melrose,* CR 68-124S, U.S.D.C., So. Dist., S.D., on December 4, 1969, in a conscientious objector case:

"By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision as the determination not to reopen is not appealable. *Robertson* v. *United States,* 404 F.2d 1141 (5th Cir. 1968). However, a reopening and consequent determination of the claim on its merits gives the defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, supra. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, supra. The board cannot actually determine the claim on its merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967)."

This is what happened in the case of petitioner.

CONCLUSION

For the reasons given, certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH ROBERT STEVEN BROSSARD,
Defendant-Appellant.

No. 23,390

[February 17, 1970]

Appeal from the United States District Court for the Central District of California

Before: HAMLIN, ELY and HUFSTEDLER, Circuit Judges

PER CURIAM:

Appellant Joseph Brossard was indicted and convicted for his failure to report for induction in violation of 50 U.S.C. App. § 462. Appellant contends that the local board improperly processed his conscientious objector claim. The United States District Court for the Central District of California, Judge Albert Lee Stephens, Jr., rejected this defense, and appellant filed the instant appeal to this court which has jurisdiction under 28 U.S.C § 1291.

The Notice to Report for Induction was sent appellant on October 26, 1966, ordering appellant to report for induction on November 15, 1966. On November 10, 1966, appellant submitted a completed Form 150, which he contends constitutes a prima facie case for conscientious objector status. However, 32 C.F.R. § 1625.2 provides that

"the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." For the purposes of this case it makes no difference whether the registrant's views on conscientious objection "crystalized" before[1] or after[2] the notice to report for induction was sent. In either situation there is no change in status "resulting from circumstances over which the registrant has no control." See *Dugdale* v. *United States*, 389 F.2d 482 (9th Cir. 1968) and *Ehlert* v. *United States*, ... F.2d..... (No. 21930) (9th Cir. February 2, 1970) (*en banc*). As section 1625.2 controls the processing of appellant's CO claim, and by virtue of this regulation the local board in the instant case was under no obligation to consider the claim first presented after the notice of induction had issued, the failure of the local board to reopen and grant a personal interview is not a denial of procedural due process.[3]

Affirmed.

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1. Contention of the government.

2. Contention of the appellant.

3. In addition, appellant mentions the fact that the local board clerk signed the order to report for induction, and that there was no showing that he was authorized by the local board pursuant to 32 C.F.R. § 1604.59 to sign such orders. Any claim of error based on the clerk's signing of the order to report for induction is foreclosed by *United States* v. *Doran*, ... F.2d ..... (No. 23368) (9th Cir. Nov. 10, 1969), and *United States* v. *Stark*, ... F.2d ..... (No. 22994) (9th Cir. Nov. 28, 1969) (*en banc*).

APPENDIX B

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSEPH ROBERT STEVEN BROSSARD, Defendant-Appellant.	No. 23390

Judgment

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered Feb. 17, 1970.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, March 30th, 1970
Before: HAMLIN, ELY and HUFSTEDLER, Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed March 2, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> *"When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was

classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided,* in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1511

JOSEPH ROBERT STEVEN BROSSARD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1512

MICHAEL KENNETH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1521

BRIAN RANDOLPH FLESCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Each of the cases in which review is sought by the above petitions for certiorari was decided by the court below on the basis of its *en banc* decision in

Ehlert v. *United States*, No. 1383, this Term, in which certiorari was granted on May 4, 1970. Each raises the identical issue presented in *Ehlert*—*i.e.*, whether the alleged maturation of conscientious objector beliefs is, within the language of 32 C.F.R. 1625.2, a circumstance "over which the registrant had no control," so that the local board is required to reopen the registrant's classification when such beliefs are alleged to have crystallized *after* a notice to report for induction has been sent. As the government has acknowledged,[1] the courts of appeals are sharply divided on this question. Resolution by this Court is thus necessary, and the Court has apparently determined that the *Ehlert* case is an appropriate vehicle in which to do so.

In view of these considerations, and since the court below expressly relied on its earlier decision in *Ehlert* in affirming the convictions involved in these cases, we suggest that action on the instant petitions should be deferred until after the Court has rendered a decision on the merits in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[1] See our petition for a writ of certiorari in *United States* v. *Holmes*, No. 1311, this Term.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 384922 707